Supreme Court, U.S.
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No. 07-726

In The

Supreme Court of the United States

BINA SHAHANI,

Petitioner,

v.

JOHN NAVANI,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of the Child Abduction and Custody Act 1985 (UK) (1985 c. 60) giving full force and effect to U.S. judicial determinations, the Tenth Circuit, which ignored the Act, could properly dismiss Petitioner's appeal as moot.

2. Whether the District Court had subject matter jurisdiction for its Return Order pursuant to the Hague Convention on Civil Aspects of International Child Abduction, where sole residence was with Petitioner and Respondent had only rights of access coupled with a *ne exeat*.

3. Whether the District Court applied the proper standard in its analysis of the "settled" exception provided in Article 12 of the Hague Convention.

4. Whether the Hague Convention on Civil Aspects of International Child Abduction comports with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

Petitioner is Bina Shahani, an individual, the mother of minor child Jivan Navani.

Respondent is John Navani, an individual, the father of the minor child Jivan Navani.

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Merle H. Weiner, "International Child Abduction and the Escape from Domestic Violence," 69 Fordham Law Review 203 (2000) 14

OPINION BELOW

Shahani v. Navani, ___ F.3d ___ (10th Cir. 2007)

JURISDICTION

(i) The judgment or order sought to be reviewed was entered July 30, 2007.

(ii) The order denying rehearing was entered August 28, 2007.

(iii) The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment 5 [pertinent part]

No person shall be . . . deprived of life, liberty or property without due process of law. . . .

Hague Convention on Civil Aspects of International Child Abduction

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other

body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5

For the purposes of this Convention –

a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

* * *

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a

view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

* * *

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the

child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[Implementing Legislation]

42 U.S.C. § 11601

(a) **Findings.** The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the

Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) **Declarations.** The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

42 U.S.C. § 11602. Definitions

For the purposes of this chapter –

(1) the term "applicant" means any person who, pursuant to the Convention, files an

application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606(a) of this title.

42 U.S.C. § 11603. Judicial remedies

(a) **Jurisdiction of courts.** The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) **Petitions.** Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) **Notice.** Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) **Determination of case.** The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) **Burdens of proof.** (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) **Application of Convention.** For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal

or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) **Full faith and credit.** Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) **Remedies under Convention not exclusive.** The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

42 U.S.C. § 11604. Provisional remedies

(a) **Authority of courts.** In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or

concealment before the final disposition of the petition.

(b) **Limitation on authority.** No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

Child Abduction and Custody Act 1985 (UK) (c. 60)

15. Recognition of decisions. – (1) Articles 7 and 12 of the Convention shall have effect in accordance with this section.

(2) A decision to which either of those Articles applies which was made in a Contracting State other than the United Kingdom shall be recognised in each part of the United Kingdom as if made by a court having jurisdiction to make it in that part but –

(a) the appropriate court in any part of the United Kingdom may, on the application of any person appearing to it to have an interest in the matter, declare on any of the grounds specified in Article 9 or 10 of the Convention that the decision is not to be recognised in any part of the United Kingdom; and

(b) the decision shall not be enforceable in any part of the United Kingdom unless

registered in the appropriate court under section 16 below.

(3) The references in Article 9(1)(c) of the Convention to the removal of the child are to his improper removal within the meaning of the Convention.

16. Registration of decisions. – (1) A person on whom any rights are conferred by a decision relating to custody made by an authority in a Contracting State other than the United Kingdom may make an application for the registration of the decision in an appropriate court in the United Kingdom.

(2) The Central Authority in the United Kingdom shall assist such a person in making such an application if a request for such assistance is made by him or on his behalf by the Central Authority of the Contracting State in question.

(3) An application under subsection (1) above or a request under subsection (2) above shall be treated as a request for enforcement for the purposes of Articles 10 and 13 of the Convention.

(4) The High Court or Court of Session shall refuse to register a decision if – (a) the court is of the opinion that on any of the grounds specified in Article 9 or 10 of the Convention the decision should not be recognised in any part of the United Kingdom;

(b) the court is of the opinion that the decision is not enforceable in the Contracting

State where it was made and is not a decision to which Article 12 of the Convention applies; or

(c) an application in respect of the child under Part I of this Act is pending.

(5) Where the Lord Chancellor is requested to assist in making an application under this section to the Court of Session he shall transmit the request to the Secretary of State and the Secretary of State shall transmit to the Lord Chancellor any such request to assist in making an application to the High Court.

(6) In this section "decision relating to custody" has the same meaning as in the Convention.

17. Variation and revocation of registered decisions. – (1) Where a decision which has been registered under section 16 above is varied or revoked by an authority in the Contracting State in which it was made, the person on whose behalf the application for registration of the decision was made shall notify the court in which the decision is registered of the variation or revocation.

(2) Where a court is notified under subsection (1) above of the revocation of a decision, it shall –

(a) cancel the registration, and

(b) notify such persons as may be prescribed by rules of court of the cancellation.

(3) Where a court is notified under subsection (1) above of the variation of a decision, it shall –

(a) notify such persons as may be prescribed by rules of court of the variation; and

(b) subject to any conditions which may be so prescribed, vary the registration.

(4) The court in which a decision is registered under section 16 above may also, on the application of any person appearing to the court to have an interest in the matter, cancel or vary the registration if it is satisfied that the decision has been revoked or, as the case may be, varied by an authority in the Contracting State in which it was made.

18. Enforcement of decisions. Where a decision relating to custody has been registered under section 16 above, the court in which it is registered shall have the same powers for the purpose of enforcing the decision as if it had been made by that court; and proceedings for or with respect to enforcement may be taken accordingly.

STATEMENT OF THE CASE

The Hague Convention on Civil Remedies for International Child Abduction was enacted in the early 1980's in contemplation of a stereotypical middle eastern male abductor. A number of popular movies and books of the era featured white western heroines

wresting back (or not wresting back) offspring abducted to various exotic venues that lack extradition.

In practice though, the Convention has mainly penalized fleeing mothers, primary caretakers whose stories of abuse have been discounted. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham Law Review 203 (2000). Petitioner Bina Shahani (hereinafter "Mother") is the paradigm.

This is a poignant case where even the district court that ruled against her recognized Mother had been her son's primary caretaker since birth and that the nine-year-old boy's "prime objective" (the court's own words) was to stay with mother in the United States and not join the grandfather's household in London.

Yet steroidal SWAT team officers, jumping the gun by twenty-four hours on a pretext that mother's "erratic driving" had endangered him, dragged the unprepared, hysterically weeping child from this law office even as Justice Breyer's petitions clerk, contacted about the emergency application filed days earlier, hung on the open phone line.

A.

IN LIGHT OF THE CHILD ABDUCTION AND CUSTODY ACT 1985 (UK) (1985 c. 60) GIVING FULL FORCE AND EFFECT TO U.S. JUDICIAL DETERMINATIONS, COULD THE TENTH CIRCUIT, WHICH IGNORED THE ACT, PROPERLY DISMISS PETITIONER'S APPEAL AS MOOT?

The Tenth Circuit Court of Appeals ruled that a UK custody order handed down shortly before oral argument of this matter mooted Mother's appeal.

Church of Scientology v. United States, 506 U.S. 9, 113 S. Ct. 447, 121 L.Ed.2d 313 (1992) says that a case is not moot unless the Court's decision cannot affect the result.

The Child Abduction and Custody Act 1985 (1985 c. 60) ("the Act"), the UK legislation implementing the Hague Convention, specifically provides a mechanism whereby the determination of a U.S. Court is not moot. The UK court shall have enforcement powers as if the decision had been made by that court.

The Fourth Circuit relies on the Child Abduction and Custody Act 1985 in rejecting mootness in *Fawcett v. MacRoberts*, 326 F.3d 491 (4th Cir. 2003), *cert. den.*, 124 S. Ct. 805 (2003). *Fawcett v. MacRoberts* is the authority most directly on point, construing as it does the identical situation of the left-behind parent with rights of access and a *ne exeat* under the same UK regime, and mother cited it repeatedly. As the Fourth Circuit notes a custody order is not a fact of nature: nothing renders it physically impossible for a

child to return to the U.S. or for a UK court to modify. A parent with a favorable Circuit Court decision from the United States comes into the UK court with a vastly improved legal position as compared to a parent lacking such a decision. Mother quoted the *Fawcett* court's citation of the relevant sections the Child Abduction and Custody Act 1985 providing the mechanism for enforcement of a U.S. determination in Mother's favor. The full text of the Child Abduction and Custody Act 1985 is an attachment to Motion for Rehearing.

But the Tenth Circuit fails to mention the Child Abduction and Custody Act 1985.

B.

DID THE DISTRICT COURT HAVE SUBJECT MATTER JURISDICTION FOR ITS RETURN ORDER PURSUANT TO THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, WHERE SOLE RESIDENCE WAS WITH PETITIONER AND RESPONDENT HAD ONLY RIGHTS OF ACCESS COUPLED WITH A *NE EXEAT*?

Per the majority of circuits, Mother had a dispositive jurisdictional issue. The Hague convention and the implementing legislation at 42 U.S.C. § 11601 et seq. provide jurisdiction for a Return Order only to enforce a right of custody, not a right of access (visitation). The latest orders of the UK court at the time mother violated them by staying in the U.S. granted

sole residency of the child to the mother. They granted father visitation rights and a *ne exeat*, whereby mother could not leave or remain outside the United Kingdom without father's permission. Mother came to the United States with his permission but overstayed, and after two years father brought his action.

A District Court lacks subject matter jurisdiction where the father seeking return under the Hague Convention did not have a custodial right but only rights of access and a *ne exeat. Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *Fawcett v. MacRoberts*, 326 F.3d 491 (4th Cir. 2003), *cert. den.*, 124 S. Ct. 805 (2003); *Gonzales v. Gutierrez*, 311 F.3d 942, 954 (9th Cir. 2002); *Cantor v. Cohen,* 442 F.3d 196 (4th Cir. 2006). Contra: *Furness v. Reeves*, 362 F.3d 702 (11th Cir. 2004).

On Mother's petition for emergency relief in May, 2006, the Tenth Circuit avoided the jurisdictional issue by ruling that mother's attorney waived it. Fourteen months later, having considered the issue after all, the Court held it was mooted by the intervening order of the UK court handed down just before oral argument. Thus it sidestepped this circuit-splitting issue while effectively plunking for the minority Eleventh Circuit.

C.

DID THE DISTRICT COURT APPLY THE PROPER STANDARD IN ITS ANALYSIS OF THE "SETTLED" EXCEPTION PROVIDED IN ARTICLE 12 OF THE HAGUE CONVENTION?

Article 12 of the Hague Convention provides that in the case of wrongful retention, a return shall be ordered forthwith during the first year, and thereafter unless it is demonstrated that the child is now settled in its new environment.

If the circuits are split as to jurisdiction for return orders to enforce rights of access, the courts are even more wildly split on the standard that applies to the "now settled" exception.

Although nothing in Article 12 speaks to acquiescence or other equitable considerations (and the Hague Convention was enacted in a civil law context that does not employ the law of equity), some U.S. District Courts have imported equitable bars to the "settled" exception. Mother cites *Anderson v. Acree*, 250 F. Supp. 2d 876 (2002) as a proper formulation of the "settled" standard. There are many other well-formulated approaches taken by the lower courts and perhaps as many less well-formulated approaches.

In its Findings of Fact and Conclusions of Law of March 31, 2006, adopted in the Opinion of May 26, 2006, the District Court went a step further and ruled that mother's wrongful retention of the child was a factor barring application of the "settled" exception. The formula is circular and absurd. If wrongful

retention is a factor barring the exception to wrongful retention, there is no Article 12 exception.

Finding mootness, the Tenth Circuit did not reach the issue.

D.

DOES THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION COMPORT WITH DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

By its finding of mootness, the Tenth Circuit also avoided consideration of a due process challenge to this international convention that does not provide for notice and hearing before determination.

International child abduction: the issue of the day when the Convention was introduced, a nasty business and highly emotional. The Hague Convention on Civil Aspects of International Child Abduction provides a very harsh remedy and an exceptionally speedy process in a quasi-criminal context. Mother was hit with an ex parte Return Order out of the blue. Her records were in London, her counsel conceded jurisdiction at the beginning of the first hearing but withdrew the concession before the end.

On April 4, 2006, mother timely filed her Answer to father's Petition, documenting her facts and contesting jurisdiction. However, the district court had

already determined that it had jurisdiction and resolved the facts against her in its order of March 31, 2006. Not only father's allegation his visitation right constituted shared custody but key factual issues of whether mother concealed the child and whether father acquiesced were summarily decided without reasonable notice or opportunity for the mother to refute.

This Court held in *Troxel v. Granville*, 530 U.S. 57 (2000) that a parent has a liberty interest, "perhaps the oldest of the fundamental liberty interests recognized by this Court," in the custody of a child. Due process requires that the defendant be heard before, not after decision. Hague Convention procedure violates this deeply held legal principle, as at least one learned court has declared, *Velez v. Mitsak*, 89 S.W.3d 73 and 89 S.W.3d 84 (Tex. Ct. App. 2002).

REASONS FOR GRANTING THE WRIT

This Court has not reviewed the Hague Convention on Civil Aspects of International Child Abduction since it was adopted in the early 1980's, but the Convention has occasioned a great deal of heated litigation and the circuits are well and truly split on major issues. The fundamental human relationship is the mother-child bond. It was dealt with very roughly here, as it tends to be in these cases.

Custody of one's children is "perhaps the oldest of the fundamental liberty interests recognized by this Court."

This is how One World arrives, not in black UN helicopters but quietly, one judicial decision at a time allowing a lower international standard to substitute for our traditional values. Judge Eginton was clearly troubled at having to sunder Jivan from his mother, to whom the boy clung so desperately that he would say whatever he thought the judge wanted to hear, but he felt his hands were tied. Bad law makes hard cases.

CONCLUSION

For the foregoing reasons, Petitioner prays this Court grant her Petition for Writ of Certiorari to the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN NAVANI, Petitioner-Appellee, v. BINA SHAHANI, Respondent-Appellant.	No. 06-2159

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. CV-06-0191-WE-JH)

(Filed Jul. 30, 2007)

Eric S. Treisman, Santa Fe, New Mexico, for Respondent-Appellant.

Gretchen M. Walther, Walther Family Law, P.A., Albuquerque, New Mexico, for Petitioner-Appellee.

Before **BRISCOE**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

BRISCOE, Circuit Judge.

Bina Shahani appeals the district court's order granting John Navani's petition that their son be returned to England, the child's country of habitual residence, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and its implementing legislation, the International Child Abduction Remedies Act. The district court concluded that Shahani wrongfully retained the boy in the United States without Navani's consent in violation of his rights of custody over the child as defined under English law, and that no exception to the mandatory return remedy under the treaty and statute applied.

During the pendency of this appeal, the English family court with jurisdiction over the child's custodial arrangements issued a new custody order concerning each parent's custodial rights. Navani argues that the new custody order moots Shahani's appeal because it effectively strips Shahani of her custodial rights over the child. We agree with Navani that the new custody order prevents us from granting Shahani any effectual relief and therefore we dismiss her appeal because it fails to present a live case or controversy.

I.

A. *The Hague Convention*

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 ("the Hague

Convention") seeks to deter parents who are dissatisfied with current custodial arrangements from abducting their children and seeking a more favorable custodial ruling in another country. *Shealy v. Shealy,* 295 F.3d 1117, 1121 (10th Cir. 2002). Generally, it creates an international legal mechanism requiring contracting states to promptly return children who have been wrongfully removed to, or wrongfully retained in, their jurisdiction, without deciding anew the issue of custody. *de Silva v. Pitts,* 481 F.3d 1279, 1282 (10th Cir. 2007). A removal or retention is "wrongful" under the treaty when the removal or retention "is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention. . . ." Hague Convention art. 3.

The International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (2007) ("ICARA"), implements the Hague Convention in the United States and grants federal and state courts "concurrent original jurisdiction of actions arising under the Convention." 42 U.S.C. § 11603(a). A petitioner who seeks an order returning a child to his country of habitual residence must show that: "(1) the child was habitually resident in a given state at the time of the removal or retention; (2) the removal or retention was in breach of petitioner's custody rights under the laws of that state; and (3) petitioner was exercising those rights at the time of removal or retention." *Shealy,* 295 F.3d at 1122 (citation omitted).

B. *Factual and Procedural Background*

Navani and Shahani were married in London, England, on December 14, 1995. Born on August 4, 1996, Jivan is the couple's only child. Navani and Shahani's marriage ended in divorce on February 16, 2004. As part of the divorce proceedings, an English family court issued a custody order ("the original custody order") concerning Jivan, which stated in relevant part:

> The Court orders that: –
>
> 1. the child Jivan NAVANI shall reside with the mother Bina SHAHANI
>
> 2. the father John NAVANI shall
>
> (i) be entitled to all information provided to parents with parental responsibility by Rosemary Works School or any other school attended by the child Jivan NAVANI
>
> (ii) in particular John NAVANI shall be entitled to have access to the child Jivan NAVANI's attendance records held by Rosemary Works School or any other school the said child attends
>
> 3. the mother Bina SHAHANI and the father John NAVANI are prohibited from removing the child Jivan NAVANI from the jurisdiction of the Court, namely England and Wales, without the written consent of the other or order of the court
>
> 4. the child Jivan NAVANI shall not be removed from Rosemary Works School without

> the written consent of the father John NAVANI or order of the court
>
> 5. the father John NAVANI shall have contact with the child Jivan NAVANI as follows:
>
> (i) during school terms, on alternate weekends, staying contact from the end of the school day on Friday to the start of the school day on Monday
>
> (ii) half of each school holiday, including school half-terms, in the absence of agreement for the first half of each holiday, where the first half if half term does not fall on a term time contact weekend, the holiday arrangement shall prevail if there is a conflict. . . .

Aplt. App. at 13-14.

On August 16, 2004, Shahani made a written request to Navani, pursuant to the original custody order, asking for his consent to allow the mother and the boy to take a holiday in the United States. After Navani consented, and Shahani failed to return to England on the agreed upon date, Navani contacted English law enforcement. Navani did not see his son again until he located Shahani and Jivan in New Mexico more than a year later.

On March 14, 2006, Navani filed a Hague Convention petition in the District of New Mexico asserting that Jivan had been wrongfully retained in the United States in violation of Navani's custody rights as established by English law. Navani asked the court

to order the boy's return to England under the Hague Convention and ICARA. After a one-day trial, the district court granted Navani's petition on March 31, 2006, finding that Shahani had breached Navani's rights of custody under English law by retaining him in the United States, thereby warranting the child's repatriation to England. The district court ordered Jivan's return to England by June 15, 2006, where he now lives. Separately, Navani moved for an award of attorney's fees and costs pursuant to § 11607. In two orders issued on May 30, 2006 and December 5, 2006, the district court partially granted Navani's two motions for fees and costs and awarded him a total of $46,779.99.

Shahani thereafter filed a notice of appeal concerning the district court's March 31, 2006, order granting Navani's petition for an order of return and the district court's May 30, 2006, order denying Shahani's motion for a new trial or to alter or amend the judgment.[1] In her opening brief, Shahani generally argued that Navani failed to satisfy his burden under the Hague Convention and ICARA to show that he possesses rights of custody over Jivan, that the one-day trial violated her right to due process of law, and that the district court's order of return was

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[1] Shahani's notice of appeal states that she appeals, in part, the "May 26, 2006" order denying reconsideration. Aplt. App. at 509. It is clear that Shahani actually means the May 30, 2006, order denying Shahani's motion for a new trial or to alter or amend the judgment.

technically deficient because it ordered the child returned to Navani's personal custody rather than to England. Navani disputed each of these contentions.

On April 30, 2007, a week before the scheduled May 7, 2007 oral argument in this case, Navani filed a motion to dismiss Shahani's appeal as moot based on an order issued by the English family court on March 23, 2007 ("the new custody order"). In pertinent part, the new custody order provides:

> (i) The Mother wrongfully and unlawfully, without the Father's consent or leave of the Court, failed to return [Jivan Navani] to the jurisdiction of England and Wales on the 6th September 2004, and thereafter wrongfully and unlawfully retained Jivan Navani in the United States of America without the Father's consent or leave of the Court, contrary to the terms of the Child Abduction and Custody Act 1984.
>
> . . .
>
> (v) By virtue of his having parental responsibility together with an order for contact (the latter made by Mr. Justice Hedley on 2nd January 2004) the First Respondent Father has and had at all material times equal rights of custody together with the Mother in relation to Jivan, including at the time of his wrongful retention in the United States in September 2004.

IT IS ORDERED THAT: –

1. The Residence Order in favour of the Mother, together with all other orders made by the Honourable Mr. Justice Hedley on the 22nd January 2004 and 28th November 2006 be, for the avoidance of doubt, discharged.

2. The child Jivan Navani shall reside with the father John Kishin Navani.

3. The Applicant Mother be forbidden to remove the child Jivan Navani from the care of the First Respondent Father and from the jurisdiction of this Court.

4. The Applicant Mother's applications for a Residence Order and an order permitting her to remove the child Jivan Navani from the jurisdiction of England and Wales be dismissed.

5. There shall be by way of Prohibited Steps Order no direct contact between the Applicant Mother and the child Jivan Navani outside the jurisdiction of England and Wales.

6. The Mother shall have indirect contact with the child Jivan Navani as follows: –

(i) Telephone contact once per week for a period of thirty minutes at dates and times to be agreed, together with such other indirect contact by telephone letter and presents as is agreed between the parties.

> (ii) Direct supervised contact within the jurisdiction as may be agreed in writing between the parties.
>
> 7. The Applicant Mother shall deliver up to the Father's solicitors all travel documents, passports and applications for the same relating to Jivan Navani as may be in her possession.
>
> 8. The Mother shall be forbidden to apply for any passport or travel document or for the grant of United States Citizenship or Rights of Abode for Jivan Navani.

Mot. to Dismiss, Ex. A at 2-4. Navani argues that the new custody order moots Shahani's appeal because it grants primary physical custody to Navani and prohibits returning the child to Shahani's custody. In her response brief to the motion to dismiss and at oral argument, Shahani opposed the motion to dismiss, contending that the new custody order conflicts with English family law, the English family court issued the new custody order without hearing argument from her counsel, and the issue of fees and costs is sufficient in itself to keep her appeal alive.

II.

Before turning to the merits of Shahani's appeal, we must first address Navani's argument that the new custody order moots her appeal. "'The mootness question necessarily constitutes our threshold inquiry, because the existence of a live case or controversy is a

constitutional prerequisite to the jurisdiction of the federal courts.'" *In re L.F. Jennings Oil Co.,* 4 F.3d 887, 888 (10th Cir. 1993) (citation omitted). We have no authority "'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States,* 506 U.S. 9, 12 (1992) (quoting *Mills v. Green,* 159 U.S. 651, 653 (1895)). A case or controversy must remain alive throughout the litigation, including on appellate review. *Thournir v. Buchanan,* 710 F.2d 1461, 1463 (10th Cir. 1983) (citing *Wiley v. Nat'l Collegiate Athletic Ass'n,* 612 F.2d 473, 475 (10th Cir. 1979) (en banc)). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology,* 506 U.S. at 12 (quoting *Mills,* 159 U.S. at 653). "The central question in determining whether a case has become moot is whether the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Phelps v. Hamilton,* 122 F.3d 885, 891 (10th Cir. 1997) (quoting *Powell v. McCormack,* 395 U.S. 486, 496 (1969)) (internal quotation marks omitted).

A.

In the event that we would conclude that the district court erred in granting Navani's Hague Convention petition and in ordering Jivan's return to England, Navani argues that the new custody order

nonetheless precludes us from granting Shahani any effectual relief and therefore moots her appeal. Navani argues that the new custody order renders Shahani's appeal moot in two ways. First, the English family court concluded in the new custody order that Shahani wrongfully retained Jivan in the United States in violation of Navani's rights of custody. Navani contends that the English family court's ruling on wrongful retention settles the issue that Shahani raises in this appeal: whether Navani had rights of custody over Jivan sufficient to trigger the Hague Convention's mandatory return remedy. Second, Navani argues that Jivan cannot be ordered to return to Shahani's custody because the English family court has determined that custody should now be with Navani, not Shahani.

We agree with Navani that the new custody order prevents us from ordering any effectual relief in this appeal. If we conclude that the district court should not have ordered Jivan's return to England because Navani failed to make his threshold showing that he possesses rights of custody over Jivan, the only way to remedy the error would be to order Jivan's return to the United States to be reunited with Navani. Yet the new custody order implicitly prohibits Jivan's return to the United States to live with his mother by forbidding "direct contact between the Applicant Mother and the child Jivan Navani outside the jurisdiction of England and Wales." Mot. to Dismiss, Ex. A at 3. The new custody order forbids Shahani from removing Jivan from his father's care and the

jurisdiction of the English family court. *Id.* Shahani cannot even possess the travel documents, such as Jivan's passport, that would be necessary for international travel. *Id.* at 4. Further, for us to decide Shahani's appeal we would have to determine whether Navani possessed rights of custody under the original custody order. But interpreting the rights of custody that the parties possessed under the original custody order would be a futile exercise because the new custody order discharges all prior custody orders. *Id.* at 3. Finally, the new custody order makes clear that contrary to Shahani's argument before the district court and on appeal that Navani had no rights of custody at the time of the alleged wrongful retention, Navani "has and had at all material times equal rights of custody together with the Mother in relation to Jivan, including at the time of his wrongful retention in the United States in September 2004." *Id.* at 2.

Although the Full Faith and Credit Clause does not require us to recognize judgments, such as the new custody order, which are rendered in foreign countries, *Soc'y of Lloyd's v. Reinhart,* 402 F.3d 982, 994 (10th Cir. 2005), the new custody order should be given effect in American courts for two reasons. First, general principles of comity normally counsel giving "considerable deference" to a foreign judgment. *See Miller v. Miller,* 240 F.3d 392, 400 (4th Cir. 2001); *Diorinou v. Mezitis,* 237 F.3d 133, 142 (2d Cir. 2001); *see also Hilton v. Guyot,* 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation, as put in

force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"). The English family court's interpretation of its domestic law – that Navani has always possessed rights of custody over Jivan and that Shahani breached those rights of custody by wrongfully retaining Jivan in the United States – is therefore entitled to our respect. *See Shealy,* 295 F.3d at 1123 (declining to "second guess" a German regional court's interpretation of German domestic law in finding that a parent's removal of a child from Germany was not wrongful because there was a military necessity).

Second, and more fundamentally, factors unique to the Hague Convention suggest that the English family court should be given the final word, through the new custody order, in this matter. While Shahani believes that we can review the merits of her appeal without taking the new custody order into account and that the district court can order Jivan's return to the United States in spite of the new custody order's provisions holding otherwise, Aplt. Supp. Response Br. at 5-6, both the letter and spirit of the Hague Convention suggest that the new custody order ends this matter.

As we and our sister circuits have repeatedly explained, the Hague Convention attempts to prevent an international version of forum shopping, wherein a parent dissatisfied with current custodial arrangements

flees with the child to another country to re-litigate the merits of custody and to obtain a more favorable custody order. *Shealy,* 295 F.3d at 1123 (describing "a parent removing a child from a country in order to avoid the jurisdiction of local courts" as "what the Hague Convention was created to prevent"); *Hanley v. Roy,* 485 F.3d 641, 644 (11th Cir. 2007); *Friedrich v. Friedrich,* 78 F.3d 1060, 1064 (6th Cir. 1996). The Hague Convention "rests implicitly upon the principle that any debate on the merits of . . . custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal" because courts in the country of the child's habitual residence are "in principle best placed to decide upon questions of custody and access." Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session (Child Abduction) 426, 430, 434-35, ¶¶ 19, 34 (1981) ("Explanatory Report")[2]; *see also de Silva,* 481 F.3d at 1285 n.6 ("'[T]he basic purpose and function of the Hague Convention and ICARA [are to ensure that] the *home* country should make the custody determination whenever possible.'") (citation omitted)

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[2] The Hague Conference that drafted the Hague Convention recognized the Explanatory Report "as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention, 51 Fed. Reg. 10494, 10503 (March 26, 1986).

(alterations and emphasis in original); *Croll v. Croll,* 229 F.3d 133, 137 (2d Cir. 2000). To defeat attempts to re-litigate custody matters in a foreign country, the Hague Convention requires contracting states to respect custody orders issued by the country of the child's habitual residence and forbids contracting states from deciding anew the underlying merits of custody orders. Hague Convention arts. 16, 19; *Friedrich,* 78 F.3d at 1066 (explaining that "the full resolution of custody issues, as the Convention and common sense indicate," must be left to courts in the country of the child's habitual residence); *Blondin v. Dubois,* 189 F.3d 240, 248 (2d Cir. 1999) ("[T]he 'whole structure of the Convention' depend[s] on the institutions of the abducted – to state generally deferring to the forum of the child's home state.") (quoting Explanatory Report at 435, ¶ 34). Instead, once a court in a contracting state finds that a child has been wrongfully removed to, or wrongfully retained in, its jurisdiction, the court must order the child's prompt return to his or her country of habitual residence without altering the custodial regime that courts in the child's home country have put in place. Hague Convention art. 12; *Shealy,* 295 F.3d at 1121 ("Our scope of inquiry under the Hague Convention is limited to the merits of the abduction claim. As such, the merits of the underlying dispute related to custody . . . are not before us.") (citation and internal quotation marks omitted).

Neither party disputes that England is Jivan's country of habitual residence. *See generally* Aplt.

Opening Br. at 7; Aple. Response Br. at 12-18. As a result, the English family court had, and continues to have, plenary jurisdiction over Jivan's custody. *See Dubois,* 189 F.3d at 246 (warning lower courts not to "exceed [their] Hague Convention function by making determinations, such as who is the better parent, that remain within the purview of the court with plenary jurisdiction over the question of custody"). The English family court retained its jurisdiction over custody regardless of whether the district court correctly decided the merits of the Hague Convention petition. *See In re Application of Adan,* 437 F.3d 381, 391 (3d Cir. 2006) ("[A] determination by the host country that a party had custody rights in the country of origin for purposes of determining whether removal was wrongful under the Convention has no bearing on the merits of a subsequent custody determination in the country of origin once the child is returned.") (citations omitted). Exercising its plenary jurisdiction, the English family court has now determined that Shahani's custody rights do not extend to removing Jivan from England and returning him to the United States. As this court has no jurisdiction to determine the parties' custody rights over Jivan, we must yield to the English family court's decision forbidding Shahani from removing Jivan to the United States. As a result, we can grant no effectual relief to Shahani.

Indeed, granting Shahani the relief she seeks would create the evil that the Hague Convention was intended to prevent: dueling custody orders issued by

separate national courts. *Ohlander v. Larson,* 114 F.3d 1531, 1541 (10th Cir. 1997) (describing the problem that the Hague Convention sought to address as the existence of "two conflicting custody decisions without guidance as to which country's custody decision had preference"). Time and again, we and our sister circuits have sought to avoid issuing an order under the Hague Convention that would present such a conflict. For instance, in *Ohlander* the parents of a little girl filed separate Hague Convention actions in the United States and in Sweden that resulted in contradictory orders: the American court concluded that the United States was the girl's habitual residence, while the Swedish court held that Sweden was her habitual residence. 114 F.3d at 1535-36. We concluded that the existence of the conflicting Swedish Hague Convention order counseled in favor of dismissing the American proceeding because we would otherwise "allow to stand two conflicting decisions regarding [the child's] state of habitual residence," an "absurd" result given the Hague Convention's purpose of avoiding conflicting custody decisions. *Id.* at 1541.

In *Miller,* an Ontario court granted custody in favor of the mother of two children, while a New York state court later granted custody in favor of the father of those children. 240 F.3d at 396. The mother filed a Hague Convention petition in federal district court seeking return of her children based on the Ontario custody order. *Id.* at 397. Recognizing that the Hague Convention "'was meant, in part, to lend priority to

the custody determination hailing from the child's state of habitual residence,'" and concluding that Canada was the child's state of habitual residence, the Fourth Circuit determined that the Ontario custody order, not the New York custody order, controlled. *Id.* at 399, 401 & n.13 (quoting *Ohlander,* 114 F.3d at 1541 (10th Cir. 1997)).

Finally, the Sixth Circuit in *Friedrich* articulated its test for when a custodial parent exercises custody rights under the Hague Convention: a custodial parent exercises custody rights unless the parent's actions "constitute clear and unequivocal abandonment of the child." 78 F.3d at 1066. One reason that the Sixth Circuit gave for adopting such a test was that arguments concerning whether a parent exercised custody rights too easily entered the "forbidden territory" of the merits of custody. *Id.* at 1065. A "broad definition" was therefore needed to prevent courts from reaching a result on the question of "exercise" that varied with what a court in the child's country of habitual residence might find regarding custody. *Id.* at 1065-66.

Although we recognize that these cases present facts different than those we encounter in our case, the harm that those cases addressed is the same that we face in this appeal – the threat of conflicting custody orders issued by separate national courts. If, after we reversed the district court's order granting Navani's petition, the district court ordered Jivan's return to Shahani's custody, the district court's order would stand in direct opposition to the English family

court's custody order forbidding direct contact between Shahani and her son. The spirit, therefore, as well as the letter of the Hague Convention prevents us from granting any effectual relief to Shahani, thereby rendering her appeal moot.

B.

To reassure us that her case is not moot, Shahani makes four separate arguments. First, she contends that the issue in her appeal remains whether Shahani breached Navani's rights of custody under the original custody order – an issue that she asserts remains regardless of the English family court's subsequent custody proceedings. Aplt. Mot. to Dismiss Response Br. at 4; Aplt. Supp. Response Br. at 5. While in a narrow sense Shahani is correct that the *issue* she asks us to address is still before us, the fact remains that we cannot grant her any effectual *relief,* even if we decided the issue in her favor, for the reasons we stated above.

Second, Shahani asserts that the new custody order violates principles of English family law in determining that Navani had equal rights of custody at the time of the allegedly wrongful retention. Aplt. Mot. to Dismiss Response Br. at 2-3. According to Shahani, the new custody order therefore "fails" as controlling subsequent authority. *Id.* at 2. Even if we agreed with Shahani's characterization of the new custody order as being contrary to settled principles of English law, the only way for us to remedy the

error would be to hold that the English family court incorrectly interpreted its own law in deciding custody. The Hague Convention explicitly forbids us, however, from determining the merits of custody. Hague Convention arts. 16, 19. As the forum with plenary jurisdiction over custody, the English family court system is the only appropriate venue for challenging the new custody order.

Third, Shahani suggests that the new custody order should have no effect in American courts because it was issued ex parte without her participation. Aplt. Mot. to Dismiss Response Br. at 3-4. It is true that principles of comity generally require us to examine the fairness of the foreign country's judicial procedures. *See* Restatement (Third) of the Foreign Relations Law of the United States § 482 cmt. b (1987) ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered."). In analyzing the fairness of a foreign judicial system, we inquire if

> "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system

> of laws under which it is sitting, or fraud in procuring the judgment."

Phillips USA v. Allflex USA, 77 F.3d 354, 359 (10th Cir. 1996) (quoting *Hilton*, 159 U.S. at 202). Although Shahani wishes to leave us with the impression that the English family court is a renegade body that routinely issues orders without hearing from both sides, Shahani's affidavit makes clear that Shahani's failure to participate in the English family court proceedings was her choice, not the result of the inherent unfairness of the English judicial system. As she relates in her affidavit, Shahani made a strategic decision not to participate in the English family court proceedings that produced the new custody order because she feared arrest for her alleged abduction of Jivan in 2004 if she returned to England. Aff. of Bina Shahani at 2-3. Instead, she decided that she would have a better chance of winning a more favorable ruling if she and her counsel declined to take part in the English family court's proceedings. *Id.*

Fourth and finally, Shahani asserts that this appeal is analogous to *Whiting v. Krassner*, 391 F.3d 540 (3d Cir. 2004) *cert. denied*, 545 U.S. 1131 (2005), and *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), in which the Third and Fourth Circuits concluded that an appeal of an order granting a Hague Convention petition is not mooted by the child's return to his country of habitual residence during the pendency of the appeal. In *Fawcett*, whose logic the Third Circuit substantially adopted, the Fourth Circuit explained that it retained the power to grant

meaningful relief because the district court could order the child's return to the United States following a reversal and remand. 326 F.3d at 496. Furthermore, it noted (because the case involved Scottish law) that the courts of the United Kingdom are required by statute to recognize another contracting state's Hague Convention orders – meaning that if a federal court of appeals reversed a district court's granting of a return petition, the courts of the United Kingdom would recognize that reversal and provide for the child's return to the United States. *Id.* at 496-97. Finally, even if the United Kingdom was not so solicitious of a foreign court's orders, an American court could still find a non-complying petitioner in contempt. *Id.* at 497.

Even if *Fawcett* and *Whiting* are correct that a child's return to his country of habitual residence fails to moot an appeal -- an issue we need not reach in this case[3] – Shahani's appeal differs from *Fawcett* and *Whiting* in one critical aspect: Shahani's appeal became moot as a result of the terms of the new custody order, *not* the mere fact of Jivan's return to England. Assuming that we had the power to alter the status quo, prior to the issuance of the new custody

[3] It should be noted that the Eleventh Circuit, in disagreement with the Third and Fourth Circuits, has concluded that a Hague Convention case becomes moot upon the child's return to his country of habitual residence because federal courts become "powerless" to grant relief to the respondent afterward. *Bekier v. Bekier*, 248 F.3d 1051, 1054-55 (11th Cir. 2001).

order, by ordering Jivan's return to the United States, we lost that authority once the English family court altered the terms of the child's custody to forbid Jivan from traveling to the United States to have contact with his mother. As the English family court retained jurisdiction at all times over Jivan's custody, and we have never had jurisdiction over the merits of the English family court's custodial decisions, we are powerless to alter the current custodial regime forbidding the very relief that Shahani seeks: return of the child to the United States.

Shahani contends that *Fawcett* and *Whiting* are analogous, however, in two other respects. First, Shahani maintained at oral argument that an order reversing the district court's granting of Navani's Hague Convention petition would affect how the English family court, in the future, apportions custody among the parties. Beyond a citation to an email from Shahani's English lawyer stating that if Shahani "wins [in America] it would help [in England]," Shahani provides no legal authority for such an assertion. The new custody order gives every indication that it resulted from the English family court's own evaluation of the merits of custody, rather than being dependent on the outcome of the Hague Convention proceeding in New Mexico. Shahani makes no specific argument to the contrary.

Second, Shahani suggests that the district court's orders on attorney fees and costs prevent her appeal from becoming moot, but these rulings are insufficient to extend the life of this appeal. *See Citizens for*

Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1183 (10th Cir. 2000) ("[T]he general rule is that an interest in attorney's fees is insufficient to create an Article III case or controversy where a case or controversy does not exist on the merits of the underlying claim.") (quoting *In re Western Pac. Airlines, Inc.,* 181 F.3d 1191, 1196 (10th Cir. 1999)). While we agree that Shahani's appeal could become moot while the parties' controversy over fees and costs could still remain, *Dahlem v. Bd. of Educ. of Denver Pub. Schs.,* 901 F.2d 1508, 1511 (10th Cir. 1990), Shahani's notice of appeal designated the district court's March 31, 2006, order granting Navani's petition for an order of return and the district court's May 30, 2006, order denying Shahani's motion for a new trial or to alter or amend the judgment, but failed to designate the district court's fees and costs orders. Aplt. App. at 509. As a result, unlike the appellants in *Fawcett* and *Whiting* who did appeal the district court's fees and costs orders, we have jurisdiction to review only the two orders that Shahani designated. FED. R. APP. P. 3(c)(1)(B) ("The notice of appeal must: . . . designate the judgment, order, or part thereof being appealed. . . ."); *Averitt v. Southland Motor Inn,* 720 F.2d 1178, 1180 (10th Cir. 1983) ("[A]n appellate court has jurisdiction to review only the judgment or part of the judgment designated in the notice of appeal.") (citation omitted). Further, it is clear that Shahani intended to appeal only the two listed orders, as the parties' briefing focused exclusively on these two orders. *See generally* Aplt. Opening Br.; Aple. Response Br.; Aplt. Reply Br. As such,

she cannot now seek review of rulings from which she failed to appeal. *Cunico v. Pueblo School Dist. No. 60,* 917 F.2d 431, 444 (10th Cir. 1990) ("Plaintiff clearly intended to appeal only a portion of the trial court's order respecting damages and fees, and our jurisdiction does not extend to other matters of the judgment that plaintiff may now wish to appeal.") (citation omitted).

III.

Navani's motion to dismiss this appeal as moot is GRANTED and this appeal is DISMISSED. Shahani's motion for reargument is DENIED. Navani's request for attorney fees is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE THE APPLICATION OF:
JOHN NAVANI,

Petitioner,

v.

Civ. No.
06-0191 JCH/LFG

BINA SHAHANI,

Respondent.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Respondent's Motion for New Trial; Alternatively, Motion to Alter or Amend Judgment; Motion for Stay of Enforcement of Order, filed April 14, 2006 [Doc. No. 17] ("Motion for New Trial"). The Court, having considered the motion, briefs, and relevant law, and being otherwise fully informed, finds that the motion is not well taken and will be **DENIED**.

DISCUSSION

In the Motion for New Trial, Respondent asks this Court to grant a new trial pursuant to Federal Rule of Civil Procedure 59. In support of this request, Respondent claims that the March 31, 2006, Order was clearly erroneous and that the Court should consider new evidence. In the alternative, Respondent asks the Court to stay enforcement of the March 31, 2006, Order pending decision of Respondent's petition for an order of protection pursuant to the

New Mexico Family Violence Protection Act, NMSA §§ 40-13-1 *et seq.*[1]

I. Motion for New Trial.

The Tenth Circuit has held that "grounds warranting a motion to reconsider include . . . new evidence previously unavailable, and . . . the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Resources Corp.,* 57 F.3d 941, 948 (10th Cir. 1995)). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts [or] a party's position." *Id.* (citation omitted). Respondent asks the Court to grant a new trial on both of these grounds.

A. Clear Error.

Respondent argues that the Court made an unlawful custody determination in the March 31, 2006, Order. Specifically, Respondent challenges the

[1] The New Mexico Family Violence Protection Act petition originally was filed in the state district court. *See Shahani v. Navani,* D-0101-DV-2006-00221, First Judicial District Court. Petitioner removed the case to this Court, *see Navani v. Shahani,* No. CIV 06-267 ACT/RHS, and filed a motion to consolidate the Family Violence Act case with this case. Respondent, in turn, filed a Motion for Remand and Lack of Subject Matter Jurisdiction, which is still pending before Magistrate Judge Torgerson. *See id.*

following language in the March 31, 2006, Order: "On March 22, 2006, *the Court held a hearing concerning the proper jurisdiction, the British or the United States court, for determination of the custody of the minor child*," and "For the foregoing reasons, the Court GRANTS the petition *since the Court in Great Britain is the appropriate jurisdiction for determination of the custody of the child*." Respondent argues that by this language the March 31, 2006, Order impermissibly decides which court has jurisdiction over the custody of the minor child.

The parties agree, as does this Court, that the Hague Convention of the Civil Aspects of International Child Abduction ("Convention") empowers courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims. *See* International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601(b)(4). The March 31, 2006, Order, however, does not decide underlying child custody claims. Rather, the Order clearly addresses whether, under the Convention, exceptions apply that would justify the retention of the minor child in the United States. As the Order explains, "The Hague Convention was created to protect children internationally from the harmful effects of a wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Mar. 31, 2006, Order, p. 5 (citing Hague Convention, Preamble, 51 F3d. Reg. 10498). The Court found that Petitioner demonstrated that the retention of the

minor child in the United States was wrongful. Specifically, the Court concluded that Petitioner had demonstrated that retention caused a breach of his custodial rights pursuant to the country of the child's habitual residence, and that at the time of the retention he actually was exercising those rights. *Id.* at 6. The Court further explained that because Petitioner had established that retention was unlawful, the burden shifted to Respondent to establish a defense to the minor child's removal. *Id.* Because the Court determined that Respondent failed to establish any of the narrow defenses to wrongful removal, *see id.* at 8, the Court ordered that the child be returned to England pursuant to the Hague Convention, *id.* at 9. The March 31, 2006, Order properly applied the law set forth in the Hague Convention to determine whether the minor child should be returned to his country of habitual residence. Accordingly, the Court denies Respondent's Motion for a New Trial on the ground of clear error or manifest injustice.

B. New Evidence.

Respondent also asks the Court to grant a new trial so that it can consider new, previously undiscovered evidence. Specifically, Respondent maintains that on March 29, 2006, following the hearing on the merits that formed the basis for the March 31, 2006, Order, Petitioner abused the minor child during a court-ordered visitation. According to Respondent, the minor child reported to Respondent, a child clinical psychologist Dr. Edward Siegel, Ph.D., and Dr.

Charles D. Glass, Ph.D. that Petitioner hit, struck, or pushed the minor child. Respondent maintains that this new evidence warrants reconsideration of the portion of the March 31, 2006, Order that finds Respondent failed to establish a defense to return of the child by demonstrating that there is a grave risk that returning the minor child to England would expose the child to harm.

The Hague Convention specifically provides that a party opposing return of a minor child to a country of habitual residence may defend against return by showing "by clear and convincing evidence that there is a grave risk that the return of the child would expose the child to physical or psychological harm." Hague Convention Article 13(b); ICARA, 42 U.S.C. § 11603(e)(2)(A). The Court concludes that Respondent has failed to meet this exacting legal standard by presenting any new evidence that would demonstrate by clear and convincing evidence that returning the child to England would place the child at grave risk. Although Drs. Siegel and Glass testified that the conduct alleged by the minor child constituted "child abuse," the Court concludes that even assuming, *arguendo,* that the facts alleged were true, these facts do not rise to the level of "grave risk." Moreover, the Court not only finds that the alleged new evidence does not rise to the level of "grave risk" but also that the evidence does not constitute child abuse. The Court bases this finding upon its *in camera* interview with the minor child, the testimony of Respondent at the May 25, 2006, hearing on the

Motion for a New Trial and the March 22, 2006, hearing on the merits, and the testimony of Petitioner.

On March 22, 2006, Respondent's counsel asked her whether "the child ever suffered physical harm" at the hands of Petitioner. Tr. p. 33, ll. 19. Respondent replied, "No, not that I know of." *Id.*, ll. 20. In addition, Respondent testified that she has "always encouraged a relationship between [her] son and [her] husband, even at times when [her] husband was not interested in seeing his child." *Id.*, p. 62, lls. 20-22. There is no evidence that prior to the March 29, 2006, alleged new evidence of Petitioner's physical abuse of the minor child, that Respondent ever maintained, either in these proceedings or the English proceedings, that Petitioner had physically abused the minor child. Although the minor child did inform the Court during its *in camera* interview with the child that Petitioner hit him as alleged by Respondent on March 29, 2006, based upon Respondent's own testimony and the record in this case, the Court concludes that the minor child's testimony is not credible.

Specifically, during the Court's *in camera* interview with the minor child, the child indicated that Petitioner hits him all of the time and that the Petitioner hit him all of the time while they were in London, well before the alleged March 29, 2006, incident. If Petitioner hit the minor child all of the time, even while the child and his mother were in England, the Court has no doubt that the minor child would have informed Respondent of this fact. The

child informed the Court of the alleged constant abuse with ease, and he would have informed Respondent, or indeed Drs. Siegel and Glass, with ease as well. If this had happened, Respondent would have raised the alleged prior physical abuse in the English proceedings as well as these proceedings. Respondent, however, has made no such allegation. The Court does not find the minor child's testimony that Petitioner hits him all of the time credible, and therefore does not find the minor child's testimony that Petitioner hit him on March 29, 2006, credible.

In addition, the Court notes that based upon the minor child's testimony and demeanor, it appeared that the minor child was more concerned with the fact that spending time with Petitioner was boring and that being with Respondent was fun, than with any alleged physical abuse. The minor child stressed that his father did not give him presents during the March 2006, visit, that his father took him to basketball games, which was boring, that his grandparents had to watch him while his father was at work, which was no fun, and that he did not wish to return to England. In contrast, the minor child stated that he had fun with his mother in Santa Fe and that he wished to remain in Santa Fe with his mother. When discussing the alleged instances of physical abuse, the child stated in a casual, non-emotional manner that his father hit him all of the time and was mean to him. The abuse was not the minor child's dominant concern, but rather appeared to be a means to an end – *i.e.*, avoiding return to England. Based upon the

Court's *in camera* interview, it is clear to the Court that the minor child does not wish to return to England and prefers to remain in Santa Fe with his mother. The Court finds that this overriding concern prompted the minor child to state that his father physically abused him and does not find that the physical abuse actually occurred.

The Court also concludes that Petitioner's testimony regarding the March 29, 2006, incident was credible. Petitioner indicated that the physical contact between he and the minor child occurred in the context of fun or playful "rough-housing" that ended with the child being upset, not because he was hit by Petitioner, but because Petitioner submitted chess scores to Yahoo, which would lower the minor child's chess rating. The minor child also maintains that the incident occurred in the context of a chess game with his father, which lends further credibility to Petitioner's testimony.

The Court also notes that when Drs. Siegel and Glass testified that in their opinions Petitioner engaged in child abuse, Drs. Siegel and Glass did not have the benefit of reviewing all of the information the Court considered in finding that no child abuse occurred. Drs. Siegel and Glass met only with the minor child and Respondent. They did not meet with or talk to Petitioner. In addition, Drs. Siegel and Glass did not indicate that they were aware of Respondent's testimony that she did not know of any instances in which Petitioner physically abused the minor child and of the child's contradictory testimony

that Petitioner hits him, and has hit him in the past, all of the time. Drs. Siegel and Glass also were not privy to the remainder of the Court's *in camera* interview with the minor child, in which it was clear that the minor child's primary concern and objective was to avoid returning to England.

In addition, the Court concludes that although various witnesses testified to emotional and school-related changes in the minor child after Petitioner's visit to New Mexico, no witness was able to demonstrate that these changes were the result of March 29, 2006, incident between the minor child and Petitioner. The Court has no doubt that the minor child's pending return to England has impacted him. The minor child has made it clear that he does not wish to return to England and that he wants to remain in Santa Fe with his mother. The mere fact that the minor child is going to be uprooted from his friends, family, and home and to be moved to England would more than explain the changes in the minor child's emotional state. The Court further notes that had Petitioner not removed the minor child wrongfully from his country of habitual residence in the first instance, the minor child would not he undergoing these emotional changes.

Finally, although the Court bases its conclusion on the foregoing, the Court notes that Respondent's counsel represented that Respondent did not know that she could file a petition for an order of protection in state district court until she met with Dr. Siegel. In contrast, Dr. Siegel testified that Respondent was

aware of the procedure for filing a petition for an order of protection before she spoke with him. Based upon this, as well as the foregoing, it appears to the Court that Respondent strategically pursued the petition for an order of protection and the Motion for a New Trial as a final means to secure the minor child's retention in the United States.

Because the Court does not find that the alleged new evidence constitutes child abuse, let alone rises to the level of "grave risk" to the minor child, the Court denies Respondent's Motion for a New Trial on the ground of newly-discovered evidence.

II. Motion for Stay.

In the alternative, Respondent asks the Court to stay enforcement of the March 31, 2006, Order pending decision of Respondent's petition for an order of protection pursuant to the New Mexico Family Violence Protection Act, NMSA §§ 40-13-1 *et seq.* Because the Court already has concluded that the facts underlying Respondent's petition for order of protection do not rise to the level of child abuse or constitute "grave risk" to the child, and because the Hague Convention requires prompt return of the minor child to his country of habitual residence, the Court denies the Motion for Stay.

CONCLUSION

IT THEREFORE IS ORDERED that Respondent's Motion for New Trial; Alternatively, Motion to Alter or Amend Judgment; Motion for Stay of Enforcement of Order, filed April 14, 2006 **[Doc. No. 17]** is hereby **DENIED** in its entirety.

Dated this 26th day of May 2006.

/s/ Judith C. Herrera
JUDITH C. HERRERA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE THE APPLICATION OF:
JOHN NAVANI,

Petitioner,

and

CIV 06-0191 JCH/LFG

BINA SHAHANI,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Mar. 31, 2006)

INTRODUCTION

On March 14, 2006, this petition was filed by Petitioner John Navani pursuant to the Convention on Civil Aspects of International Child Abduction, done at the Hague on 25 October 1980 ("Hague Convention"), and the International Child Abduction Remedies Act, 42 U.S.C. Section 11601 *et seq.* ("ICARA"), relative to the custody of his minor son, Jivan Navani.

On March 22, 2006, the Court held a hearing concerning the proper jurisdiction, the British or United States court, for determination of the custody of the minor child. Having reviewed the evidence, including the testimony of Petitioner and Respondent, the Court will grant the petition in consonance

with the following findings of fact and conclusions of law.

FINDINGS OF FACT

Petitioner, John Navani, is a citizen of Great Britain. Petitioner married Respondent Bina Shahani in London, England, on December 14, 1995. The parties resided in London, England, throughout the duration of the marriage, and their marriage produced one minor child, Jivan Navani, age 9, born August 4, 1996.

The parties divorced on February 16, 2004, in the Principal Registry of the Family Division, Case No. FD00D114454, London, England. The resolution of the property issues were heard before District Judge Cushing on July 23, 2004.

The minor child resided in London, England, from his birth until August 17, 2004, the date on which Respondent removed him to the United States.

In 1997, Respondent took the child to Pakistan for a period of four months, during which period the father had no contact with the child or Respondent. In December 2002, Respondent indicated to Jivan's school teacher her intent to move with the child to Pakistan.

In light of Respondent's stated intent to move to Pakistan, a hearing was held and court orders were issued on December 20, 2002 and January 6, 2003. The order issued on December 20, 2002 provided:

The Respondent Bina Prem Navani (formerly Shahani) must not remove the child Jivan John Kishin Mohan Deepak Ishwar Navani from England and Wales. (Paragraph 1 of December 20, 2002 Order);

A Penal notice addressed to Bina Prem Navani (also known as Bina Shahani) be attached to paragraph 1 of this order. (Paragraph 4 of December 20, 2002 Order);

The Respondent do forthwith upon service of this order upon her deliver up the child's British passport to the Applicant's solicitors to be held by them to the order of the Court. (Paragraph 5 of May 19, 2004 Order, In the Principal Registry of the Family Division, Case No. FD00D11445 London, England); and

The Respondent may not apply for any alternative travel documents in respect of the child pending the hearing on the 6th January 2003. (Paragraph 6 of May 19, 2004 Order, In the Principal Registry of the Family Division, Case No. FD00D11445 London, England);

The order entered on January 6, 2003 stated:

The Respondent Bina Prem Navani (formerly Bina Shahani) must not remove the child Jivan John Kishin Mohan Deepak Ishwar Navani a boy born 04/08/96 from England and Wales without the consent of the court. (Paragraph 1 of January 3, 2003 Order, In the Principal Registry of the Family

> Division, Case No. FD00D11445 London, England);
>
> The Respondent Bina Prem Navani must immediately on service of this order on her delivery up the child's British Passport to the Applicant's Solicitors Chatterjee and Pali, 1st Floor 14-16 Mitcham Road, Tooting Broadway London SW17 9NA to be held by them to the order of the court. (Paragraph 2 of January 3, 2003 Order, in the Principal Registry of the Family Division, Case No. FD00D11445 London, England); and
>
> The Respondent Bina Prem Navani must not apply for any alternative travel documents in respect to the child without the consent of the court. (Paragraph 3 of January 3, 2003 Order, In the Principal Registry of the Family Division, Case No. FD00D11445 London, England).

A final custody order was entered by Justice Hedley in the Principal Registry of the Family Division, Case No. FD00D114454, London, England on May 19, 2004. It prohibited the parties from removing the child from England and Wales. That Court Order states, in relevant parts:

> The mother Bina Shahani and the father John NAVANI are prohibited from removing the child Jivan NAVANI from the Jurisdiction of the Court, namely, England and Wales, without written consent of the other or order of the court. (Paragraph 3 of May 19, 2004 Order, In the Principal Registry of

the Family Division, Case No. FD00D11445 London, England);

The child Jivan Navani shall not be removed from Rosemary Works School without the written consent of the father John Navani or order of the court. (Paragraph 4 of May 19, 2004 Order, to the Principal Registry of the Family Division, Case No. FD00D11445 London, England);

The father John Navani shall have contact with the child Jivan Navani as follows:

(i) during school terms, on alternate weekends, staying contact from the end of the school day on Friday to the start of the school day on Monday

(ii) half of each school holiday, including school half-terms, in the absence of agreement for the first half of each holiday, where the first half if half term does not fall on a term time contact weekend, the holiday arrangement shall prevail if there is a conflict. . . . (Paragraph 5 of May 19, 2004 Order, In the Principal Registry of the Family Division, Case No. FD00D11445 London, England);

Every further application concerning the child Jivan Navani shall be heard by Mr. Justice Hedley (save an emergency out of hours application made in relation to actual or threatened child abduction). (Paragraph 6 of May 19, 2004 Order, in the Principal

> Registry of the Family Division, Case No. FD00D11445 London, England);
>
> and
>
> All previous orders concerning the child Jivan Navani are hereby discharged save paragraph 3 of the order of District Judge Million dated 6th January 2003, in so far as the mother is prohibited from applying for any fresh documents of identity for travel purposes for the child Jivan Navani. (Paragraph 7 of May 19, 2004 Order, In the Principal Registry of the Family Division, Case No. FD00D11445 London, England).

On August 16, 2004, Respondent made a written request to Petitioner requesting consent to release the child's passport for the sole purpose of a vacation to the United States from August 17, 2004, through September 8, 2004. That day, Petitioner issued a letter to his solicitor allowing the release of Jivan Navani's passport for the sole purpose of traveling to the United States for vacation from August 17, 2004, through September 6, 2004. Respondent provided an itinerary to Petitioner showing that the child would return to the United Kingdom on September 6, 2004.

When Respondent did not return as expected on September 6, 2004, Petitioner immediately contacted the Central Authority in England to seek assistance in locating Jivan Navani. Petitioner submitted a Hague Convention Application with the Child Abduction Unit, Department for Constitutional Affairs, The Central Authority for England and Wales on

September 13, 2004. Because the Department of State could not locate the child, Petitioner also sought the assistance of the Metropolitan Police of London.

Prior to the initiation of litigation, Petitioner had not seen the child since August 16, 2004, and Petitioner had only communicated with the child twice since August 16, 2004, the last communication being August 31, 2004.

The child has been enrolled in two different schools in Santa Fe, and the child has resided in at least two different homes in Santa Fe. At present, Respondent and the child reside in a rented house with another woman and her child. Respondent has identified this woman as her cousin.

Respondent is remarried to a man with whom she does not live. Respondent stated at the hearing that she is planning to dissolve her current marriage so that she can marry another man.

CONCLUSIONS OF LAW

The Hague Convention was created to protect children internationally from the harmful effects of a wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. *Hague Convention*, Preamble, 51 Fed.Reg. 10498. Under Article 16 of the Hague Convention, this Court does not have the authority to decide the merits of an underlying custody claim. The purpose of the Hague Convention is to ensure that

custody decisions are made under the laws of the country of the child's habitual residence. *See Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (1993).

Pursuant to the Hague Convention, Petitioner has the burden to prove that the child's retention in the United States is wrongful. 42 U.S.C. Section 11603(e)(1). Petitioner must establish by a preponderance of the evidence that 1) the retention caused a breach of his custodial rights pursuant to the law of the country of the child's habitual residence, and 2) at the time of the retention those rights were actually exercised. Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1990, art 3, 51 Fed. Reg. 10503, (1986).

The Court finds that Petitioner has established these two requirements. Jivan Navani resided in London, England, for his eight (8) years of life prior to his mother bringing him to the United States, and therefore, the child's habitual residence was England prior to his retention in New Mexico.

Petitioner was granted custody rights of Jivan Navani pursuant to the May 19, 2004, Order entered in the Principal Registry of the Family Division, Case No. FD00D114454, London, England, and therefore, the retention of Jivan Navani in the United States caused a breach of Petitioner's custodial rights. Petitioner, who spent considerable periods of time with the child prior to his removal from England, was actually exercising his custody rights at the time Jivan Navani was wrongfully retained in New Mexico.

Respondent's August 16, 2004 letter requesting Petitioner's consent for her vacation with the child coupled with Petitioner's written response granting consent underscore that the father was actually exercising custody in accordance with the May 19, 2004 Order.

Because Petitioner was granted custody rights pursuant to the May 19, 2004, and because he was actually exercising those rights at the time of the child's retention in the United States, the child's retention in the United States by Respondent is wrongful. 42 U.S.C. Section 11603(e)(1).

Once Petitioner has established that the child's retention in the United States is wrongful, Respondent has the burden to establish the following defenses:

1. by clear and convincing evidence that there is a grave risk that the return of the child would expose the child to physical or psychological harm. Hague Convention Article 13(b); 42 U.S.C. Section 11603(e)(2)(A);

2. by clear and convincing evidence that the return of the child would not be permitted by the fundamental principals of the requested State relating to the protection of human rights and fundamental freedom. Hague Convention, Article 20; 42 U.S.C. Section 11603(e)(2)(A);

3. by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child became

settled in its new environment and the child is now settled in its new environment. Hague Convention, Article 12, 42 U.S.C. Section 11603(e)(2)(B);

4. by a preponderance of the evidence that Petitioner was not actually exercising custody rights at the time of the retention, or had consented to or subsequently acquiesced in the removal or retention. Hague Convention Article 13(a); 42 U.S.C. Section 11603(e)(2)(B).

A court applying the Hague Convention should apply these exceptions narrowly. *Rydder v. Rydder*, 49 F.3d 369, 372 (1995). In this case, Respondent has failed to sustain her burden of proof by a preponderance of the evidence that the child is now settled in Santa Fe, New Mexico pursuant to 42 U.S.C. Section 11603(e)(2)(B). In *Woicik v. Woicik*, 959 F.Supp. 413, 421 (E.D.Mich. 1997), the court held that the "settled in their environment" exception applied where the children of a French father petitioned for custody of his children living with their mother in the United States. In that instance, during an approximately 19 month period, the children had attended the same school or daycare, maintained close connections to maternal family members living in the area where they resided with their mother, had lost their ties to the paternal family in France, and had adopted English as their spoken language. In addition, the mother had informed the father of the children's location in the United States, and of her intention not to return to France with the children.

Here, the child has been enrolled in two different schools during an eighteen month period. The child is still well connected to the grandparents in London, who had been actively involved in locating him. Respondent has not shown that the child has lost his ties with his family in London, England. Further, Respondent's marital situation does not appear well settled. She has remarried but she does not live with her current husband. According to her testimony, she intends to divorce her husband so that she may marry another man.

Further, Respondent should not be able to benefit from using the "now settled exception" in light of her lack of disclosure as to the child's location and her wrongful retention of the child. *Antunez-Fernandes v. Connors-Fernandes,* 259 F. Supp.2d 800, 815 (2003). Although Respondent represented that she would return with this child on September 6, 2004, she never did return with the child. Respondent stated she would be in Miami, Florida, with the child, but she actually took the child to Santa Fe, New Mexico. Respondent violated the court orders regarding custody of the child, and Respondent refused to disclose the child's whereabouts. According to Respondent's testimony, she understood that she did not have Petitioner's permission to retain the child in the United States. Thus, the Court cannot find that Respondent has proved by preponderance of the evidence her entitlement to the now settled exception.

Consistent with the previous discussion concerning Petitioner's exercise of his custody rights, Respondent

has not proved by a preponderance of the evidence that Petitioner consented to or acquiesced in the removal or retention of the child. Petitioner's letter of August 16, 2004 shows that Petitioner released the child's passport for the sole purpose of the two week vacation. Petitioner's immediate application to The English Central Authority on September 9, 2004, three days after the child was to return to England, and his subsequent pursuit of finding the child, establishes that he did not consent to the child remaining in Santa Fe, New Mexico.

Petitioner has met his burden of proof that the removal and retention of Jivan Navani by Respondent was wrongful, and Respondent has not been able to establish any of the narrow defenses to the wrongful removal.[1] The Courts of Great Britain have already heard extensive evidence concerning the custody and welfare of the minor child, and the interests of this child will be best served by allowing that legal system determine the appropriate custody arrangements between the parties. Consistent with an agreement reached by the parties on the record in

[1] To the extent that Respondent pursues the first two exceptions under the Hague Convention, the Court finds she has not sustained her burden of proof as to a grave risk that the return of the child would expose the child to physical or psychological harm, or that the return of the child would not be permitted by the fundamental principals of the requested State relating to the protection of human rights and fundamental freedom.

open court, the Court will order the child to be retuned to London, England, by June 15, 2006.

CONCLUSION

For the foregoing reasons, the Court GRANTS the petition, since the Court in Great Britain is the appropriate jurisdiction for determination of the custody of the child. Accordingly, the Court orders that the child must be returned to London, England, by June 15, 2006. The Court will retain the passport of the child until release is necessary for the child's return to London, England.

A motion for attorneys' fees may be filed within 30 days of this ruling.

SO ORDERED this 30th day of March, 2006.

/s/ Warren W. Eginton
WARREN W. EGINTON,
SENIOR UNITED STATES
DISTRICT JUDGE SITTING
BY DESIGNATION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN NAVANI, Petitioner-Appellee, v. BINA SHAHANI, Respondent-Appellant.	No. 06-2159 (D.C. No. CIV-06-191 JH/LFG)

ORDER

(Filed August 28, 2007)

Before **BRISCOE**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: [Illegible]
Deputy Clerk